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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF OF APPELLANT.

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Certain statements made in the brief of appellee are, we believe, misleading. This reply is therefore made. The order of appellee's argument is followed.

I.

A. The rule of practical construction is invoked. The claim is, that since the railroad company in making its reports acquiesced in the inclusion of credit balances, it may not now question the right of the State to tax them. An examination of Exhibit 2 (R. 76-A), being the printed form of report furnished by the Minnesota Tax Commission, does include item 22(a), "credit balance freight cars in transportation service." The total amount of tax

paid by the Company on this item for the eight years in question, computed according to the rules, or uniform system of accounts, or formula (whichever it may be designated) prescribed by the state, amounted to but a few dollars,—$153.73 to be exact. This is obviously not such an amount as would justify protracted litigation to test the legality of its imposition. Using the state's form and following its formula in reporting a small tax is surely no bar to contesting the imposition of a much larger one under a wholly different formula, later on.

Mere payment of a tax without protest however long continued does not create an estoppel. This exact question has been decided in *Kansas C. S. Railway Co.* v. *Ogden Levee District*, 15 Fed. (2d) 637, 643 (affirmed again in 39 Fed. (2d) 884) wherein it was held that the fact that a railroad company had paid a levee tax for fourteen years without protest, during which time bonds had been levied by the levee district, did not create an estoppel. In *Morgan, etc. R. R. Co.* v. *Aucoin*, 140 La. 768, 73 So. 859, the Supreme Court of Louisiana held that the mere fact that the plaintiff railroad company had paid a certain tax from 1908 to 1914 at exactly the same rate "could not possibly be good ground for continuing to pay it".

But we adopt appellee's suggestion that the rule of practical construction be applied. It is disclosed by the record that from 1908 until 1934 when this suit was brought, the State of Minnesota, acting through its Public Examiner and Tax Commission, placed a very definite construction on the gross earnings statute. This construction is explicitly disclosed by the printed instructions found on the back of the form furnished to the railroads for their use in making their returns. The following instruction from the Tax Commission to the railroads is found thereon (see Exhibit 2, R. page 760A, underscored in red):

> "NOTE—You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if

any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year."

Thus for twenty-five years the taxing officials for the State of Minnesota, acting under express statutory authority (Sec. 2239, Mason's Minnesota Statutes 1937, App. B, Appellant's Brief, page 57) did place a construction on the gross earnings statute, compliance with which required the railroad company to allocate to Minnesota only so much of the per diem credit balances, if any, as equaled the Minnesota percentage of revenue freight car mileage *of the reporting road.*

A contemporaneous exposition of statutory provisions not clear in themselves, and well established practice under them universally acquiesced in and followed for a long period of years, is entitled to great weight and consideration by the courts.

State v. *Northern Pac. Ry. Co.*, 95 Minn. 43, 103 N. W. 731.

In re Estate of Boutin, 149 Minn. 148, 182 N. W. 990.

City of South St. Paul v. *Northern States Power Co.*, 189 Minn. 26, 248 N. W. 288.

In re Strauch's Estate, 95 Minn. 304, 104 N. W. 535.

U. S. v. *Minnesota*, 270 U. S. 181-205.

U. S. v. *Burlington & Missouri River R. R. Co.*, 98 U. S. 334-41.

Schell's Executors v. *Fauche*, 138 U. S. 562-72.

Louisiana v. *Garfield*, 211 U. S. 70-6.

U. S. v. *Hammers*, 221 U. S. 220-8.

Logan v. *Davis*, 233 U. S. 613-27.

This rule, which finds universal support in the decisions, is particularly applicable to the facts in this case. It approaches unconscionable action for the state to adopt a definite construction of the statute and follow it for twenty-five years, then to suddenly abandon it for no reason at all except to reach a larger part of fictitious interstate earnings than its previous construction permitted.

This is exactly the basis of allocation for which appellant now contends, if per diem credits are taxable in any amount.

This formula found on the printed form furnished by the State is referred to in appellee's brief as "defendant's formula". The only basis for so designating it lies in the fact that the railroad company has at all times during this litigation consistently urged that it should be followed. First, because it is the formula which was prescribed by the taxing authorities acting under specific statutory authority, and second, because it does allocate to Minnesota a proportion of interstate per diem credits, having some appropriate and rational relationship to the amount or value of appellant's taxable property in the state. For obvious reasons, the State does not now refer to it as its formula, although it does not dispute, nor can it dispute under the facts disclosed by the record, that this formula was, in fact, adopted by the Public Examiner and Tax Commission and was in actual and unvarying use for a period of twenty-five years. The Supreme Court of Minnesota expressly recognizes this, saying: (*State* v. *Illinois Central R. Co.*, 274 N. W. 828, 829; R. 101)

> "The Minnesota Tax Commission had promulgated rules and furnished printed forms for the returns. The rules incorporated that of *State* v. *Minnesota & International Ry. Co.*, 106 Minn. 176, together with the following: Note—(Above formula, Ex. 2, quoted.)"

We, therefore, welcome application of the rule invoked by appellee as stated at page 12 of its brief:

> "In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

B. It is said that appellant's answer does not deny the right of the State to tax per diem credits in any amount, that the objection is to additional taxes only.

The amended and substituted answer (R. 3-8) speaks for itself:

> "VI. The defendant alleges that such exchange of cars is a mere interchange of service and does not produce or constitute gross earnings or revenue in the operation of the railroad within the provisions of the Minnesota statute."

Then too paragraph III of the answer is a general denial, which alone is sufficient to put in issue the right to any recovery.

C. The second answer to appellee's contentions is that any question concerning the sufficiency of the answer should have been raised in the Minnesota court. The Minnesota courts accepted the answer as sufficient and passed on the question.

D. The first judgment (R. 98) was based on a formula (shown by the findings of fact and conclusions of law (R. 77-81)) which was neither urged by the state nor suggested by the company. It was one invented by the trial court. The amount of the tax it produced was not large and there was no occasion for defendant to appeal. Estoppel to question the Burlington formula cannot be based on failure to prosecute an appeal from a judgment based on one entirely different.

> "No estoppel arises by acquiescence in acts other than or different from the acts which the party claim-

ing the estoppel alleges he is entitled to commit by reason of the estoppel."

21 C. J. Sec. 222, p. 218.

Nor will mere non-action or passivity create an estoppel (ibid).

Contrary to appellee's contention, the assignment of errors in the Supreme Court of Minnesota, set out as Appendix A in appellee's brief, definitely shows that the questions herein were all raised in the Supreme Court of Minnesota. Error is there predicated on the application of the Burlington formula to produce a tax *in any amount;* and is likewise predicated on the rendition of a judgment in any amount. It is true the assignment of errors includes the objection to additional taxes, but since the State was seeking to impose an additional tax, of necessity that objection was made.

E. It is only necessary to examine the assignment of errors in this court (R. 219-221) to make certain that the question of the right to tax in any amount is raised. The first assignment raises an objection to the entire judgment.

Availability of Actual Figures.

Appellee unequivocably states:

"that railroad companies can get the actual figures showing the periods of time when a car is on their line." (App. Brief, p. 4.)

To this is added:

"But they contend it would be expensive."

The record does not support the claim made. Reference is to page 47. There it is said, that wheel reports (long since destroyed under rules of the Interstate Commerce Commission) disclose:

"the period of time, *within a day,* when a foreign car is on your line and the dates of your cars were on foreign lines."

This falls far short of supporting the statement made by appellee. It will be noted that the wheelage reports would be accurate *"within a day"*. Applied to the vast number of these items, an error of one day would make possible inaccuracy in the totals running into millions. The actual figures are not available (R. 68) and every court in Minnesota having anything to do with this case so found. The Supreme Court of Minnesota said, adopting the language of the trial judge (R. 101):

> "The defendant's records which would show the number of days its freight cars were in possession of other Minnesota roads, in Minnesota during said eight year period, were, pursuant to the rules of the Interstate Commerce Commission, destroyed by defendant before this controversy arose, so that the number of correct days to be apportioned to Minnesota cannot be determined to a mathematical certainty. *That would be impossible in any event* because the best practicable records (the wheel reports) would seldom if ever disclose just when or where a freight car crossed a state line."

The belated offer of the State to accept the actual figures is not only gratuitous, but meaningless. Any obligation to attempt to furnish the nearest approach to actual figures was definitely waived by the State in promulgating the rules found on the printed form furnished by the Tax Commission (Ex. 2). The Chairman of the Commission, Mr. Boyle, testified that actual figures had never been required by the state (R. 122). Realizing that the actual figures were not available, the Commission, in these printed instructions, told the carriers to strike a system balance and allocate to Minnesota a percentage of the credit balance, if any, equal to the percentage of the reporting road's revenue freight car mileage in the State. This was consistently done for twenty-five years.

II.

TAXABILITY OF CAR RENTAL CREDIT BALANCES.

It is next argued by appellee that car rental credit balances are taxable. This is perhaps true if the tax is not treated as a tax on income as such, derived from interstate operations, in which event it would be a burden on commerce. It is perhaps also true, if it is not a tax on the cars themselves since they have no taxable situs in Minnesota. It is perhaps also true, if it is not a tax on the cars themselves, so considered as the result of the taxation of the freight earnings of such cars, since such earnings are already taxed against the using line, and the result would be double taxation which the Supreme Court of Minnesota has repeatedly held was not intended.

State v. *St. Paul Union Depot*, 42 Minn. 142, 43 N. W. 840.

In the final analysis these freight car per diem credit balances (which, if taxable, must be actual, not fictitious) can only be constitutionally taxed when treated, not as a true tax on the income itself, but solely as a convenient method for measuring the value of the taxable property in the State. If used for this permissible purpose, the amount of the credit balances, if any, arising from the interstate operations allocated to the State of Minnesota, must have some reasonable and appropriate relationship to the value of the property taxed. It is this later essential qualification and limitation that appellee blithely ignores.

The tax is not a tax on income as such. It is a tax on property in lieu of all other taxes.

Minnesota & St. L. R. R. Co. v. *Koerner*, 85 Minn. 149, 88 N. W. 430, 431.

State v. *Great Northern R. R. Co.*, 163 Minn. 88.

State v. *Illinois Central R. R. Co.*, 200 Minn. 583, 274 N. W. 828, 829.

(R. 100.) It would be unnecessary to repeat that it is a tax on property in lieu of all other taxes but for the apparent insistence of appellee that this fact may be ignored and, to justify the new formula, it has a right to treat the tax as a true tax on income. This is obviously the erroneous assumption on which the decisions of the Supreme Court of Minnesota in this case are based. The court and counsel for appellee have consistently refused to admit that the amount of interstate earnings allocated to Minnesota for taxation and for use as a measure of the tax on taxable property in the State must have a reasonable and appropriate relationship to the amount and value of the property sought to be taxed.

It is suggested that the tax computed under the Burlington formula is not shown to exceed that which would be imposed on an ad valorem basis. This suggestion would be pertinent but for the fact that the relationship between actual and assessed values, varies in the several counties of the State. No attempt has ever been made by the State to fix any ratio of actual value to the assessed value of railroad property, nor would the taxing authorities or representatives of the State at the trial admit that any such ratio of percentages uniformly existed or could be shown. The State has chosen to measure the value of railroad property by gross earnings. That yardstick has been misused. It is definitely shown without dispute, that the smaller the road, *i. e.* the less property it has in the state, the greater is the percentage of per diem credits taxed; this coupled with the admission of the state taxing authorities that there is no relation between the amount of the tax and the amount of property taxed (R. 149, 151) is sufficient to condemn the newly adopted formula.

Per Diem Credits Not an Asset.

It is said by appellee (B. 21):

> "The use by other railroads of rolling stock or freight cars is an asset to a railroad company."

This assertion is not supported by the record. On the contrary, the record shows without dispute that the average cost of owning a freight car is $1.05 to $1.17 per day (R. 62). The compulsory interchange of cars under Section 15 of the Interstate Commerce Act is a hardship and adds nothing whatever to the value of railroad property. In the light of this uncontradicted evidence, the argument that the use by other railroads of freight cars belonging to a carrier is an intangible asset adding to the value of railroad property, which might be used as the basis for increasing its assessed valuation, thus finds no support in the record, but the exact contrary is shown. Unless the loss of from 5 to 17 cents per car per day while on other lines is an advantage, which only the stubborness of the company suffering the loss prevents it from acknowledging. The argument belongs in the same category as that advanced by the State in contending that the Burlington formula should be used, since it converts an actual system deficit (for seven of the eight years in question) (R. 56) into a fictitious taxable credit.

III.

Is the Burlington Formula Fair.

Appellee repeats the *ipse dixit* of the Supreme Court that the Burlington formula is the fairest and most accurate which can be devised. Passing the admitted fact that it was never adopted by that agency of the state authorized by statute (Sec. 2239, App. B) to prescribe the

system of accounts to be followed, this conception of fairness is confronted with the following stark facts:

A. It has, as the evidence shows, and the corporate examiner of the state having charge of this tax litigation admits (R. 151) no appropriate relationship to the value of the property taxed.

B. The smaller the road, and consequently the less the value of its property, the greater is the percentage of the credit balances taxed. (R. 144, 152, 154, 165, 170, Ex. 21, and tabulated statements which have been certified to the Clerk of this Court.)

C. It is discriminatory. In 1935 and 1936 it produced no tax whatever against 19 other roads which filed returns, most of which had many times as much property in the State subject to taxation as had the Illinois Central (see same statements).

D. It turns an actual debit balance into a fictitious credit balance. (R. 56.)

E. The amount of interstate earnings allocated to Minnesota for taxation under it is based upon the mileage of railroads other than the taxed or reporting road, contrary to any reasonable conception of a gross earnings tax, since obviously interstate gross earnings should be allocated to a state for taxation purposes in proportion to the value of the property and the extent of operation of the line of the reporting or taxed company.

Double Taxation.

It is said by appellee:

> "A tax that is not based on an arbitrary discrimination is not objectionable because it is a double or unequal tax." (B. R. 33.)

No claim is made that double taxation in itself is unconstitutional. It is contended that if the tax be construed as

a tax on the cars themselves which produce the earnings, it is a burden on commerce because the cars have no taxable situs in Minnesota; so also if it is a tax on the cars, it is double taxation, since the freight earnings of the cars are taxed to the using road *without deduction of the amount paid to the owning road* and is, therefore, a discrimination which the Supreme Court of Minnesota has definitely held was not intended.

State v. *St. Paul Union Depot*, 42 Minn. 142, 43 N. W. 840, 842.

In *Cudahy Packing Company* v. *Minnesota*, 246 U. S. 450, 456, the tax on the freight line company was sustained by the Supreme Court of the State of Minnesota (129 Minn. 30) and by this court for the reason that the railroad companies in reporting freight receipts derived from the use of the cars *deducted* the rental paid to the Cudahy Packing Company, the freight line company. The record discloses that the using companies pay a tax on freight earnings *without deduction* of any amount paid for per diem rental.

It is said (B. 34):

> "It is impossible to devise a system of taxation which will distribute the tax burden perfectly in accord with every circumstance."

This may be admitted, but surely it is possible to devise a system where the interstate earnings allocated for taxation are in appropriate proportion to the value of the property taxed. If the reporting road's proportion of revenue freight car mileage in Minnesota is used as the factor for allocating to the State a part of interstate earnings for taxation, a reasonable degree of accuracy will be attained. There was no need to change the method used for twenty-five years.

IV.

NON-WAIVER AS RESULT OF MISTAKE IN COLLECTING CORRECT AMOUNT.

Appellee contends that the State cannot waive payment of the correct amount because of a mistake made by those charged with the collection of the tax. This may be true, but no such situation here exists. The Supreme Court of Minnesota attempted to apply the rule now invoked, saying (R. 107):

> "There can be no such estoppel for the simple reason that in the imposition of taxes the State acts in its sovereign, rather than in its proprietary, capacity."

It may be admitted that the state is acting in its sovereign capacity and those charged with the collection of the tax must collect the full amount. We have no quarrel with the soundness of the rule. But acting in a sovereign capacity is no excuse for waiting thirteen years after the tax has been paid in full, according to the system of accounts legally prescribed by the state itself, and then suing for many times as much more, computed under a formula never even heard of until the first trial was over.

The State insists that the full amount due should be paid, but neglects to point out how this full amount could be determined other than by the application of a formula. It chooses to ignore the fact that that agency of the State specifically authorized by the legislature to promulgate a uniform system of accounting, did that very thing, and that only by the use of this formula (Ex. 2, R. 76-A) could the amount of the tax be determined.

The Supreme Court finally admits in the third opinion (R. 200):

> "That it had to be computed according to some formula."

It apparently is the contention of the State that the Illinois Central Railroad Company was bound to ignore the formula legally prescribed by the proper state agency and to anticipate that in November, 1939, 13 years later, the State would, and legally could, by judicial construction, adopt an entirely new and different formula or method of accounting,—a formula which, as the record discloses and the Supreme Court admits, was never promulgated by the agency authorized to act. And, as both the trial court and the Supreme Court point out

> "was not even suggested below until the motion for amended findings or a new trial." (R. 97 and 105.)

V.

REVIEWABILITY OF STATE ACTION.

It is scarcely necessary to again point out that the case is one involving the constitutionality of a statute of the State as construed and applied both by the administrative agencies and the Supreme Court of Minnesota. Under the State decisions the formula becomes a part of the statute itself and is properly reviewable on constitutional grounds under Section 237 of the Judicial Code.

Respectfully submitted,

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